In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-397

SUSAN GARFINKLE and GARY GARFINKLE,
Appellants,

vs.

WELLS FARGO BANK, AMERICAN SECURITIES COMPANY and the SUPERIOR COURT OF CONTRA COSTA COUNTY,
Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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Susan and Gary Garfinkle appeal from the judgment of the Supreme Court of the State of California, which ruled that "California's nonjudicial foreclosure procedure does not constitute state action and is therefore immune from the procedural due process requirements of the federal Constitution." Appendix A at 17.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 21 Cal.3d 268, 146 Cal.Rptr. 208, 578 P.2d 925, and is attached hereto as Appendix A. The court's order denying a rehearing, is attached as Appendix B. The trial court's opinion is attached as Exhibit D.

JURISDICTION

This action is a petition for a writ of mandate, brought under California Code of Civil Procedure § 1085, to compel the superior court to conduct a trial on appellants' contention that the threatened foreclosure sale of their home is repugnant to the United States Constitution. The California Supreme Court filed its opinion on May 16, 1978, and denied a rehearing on June 15. Appellants filed a notice of appeal in that court on August 25, 1978. Appendices A-C.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2). If the Court determines that an appeal does not lie, then pursuant to 28 U.S.C. § 2103, appellants request that this document be treated as a petition for a writ of certiorari.

STATUTES INVOLVED

This action challenges the validity of California's statutory scheme for nonjudicial foreclosure of real property. The statutes material to this appeal are Civil Code §§ 863, 1214, 2220, 2258, 2267, 2920, 2924-

2924h, 2932 and 2934a; and Code of Civil Procedure §§ 529, 1161a and 1174. Pertinent portions of these statutes are set out in Appendix F.

QUESTIONS PRESENTED

1. Do homeowners have a right to Due Process when a bank invokes the authority of the State, including its statutes, procedures, records, courts and law enforcement officers, to compel the surrender of possession and all other interests in a family home?

2. If there is such a right, does California's procedure violate Due Process requirements?

STATEMENT OF THE CASE

1. Facts and proceedings below.

On April 27, 1967, appellee Wells Fargo Bank issued a $19,500 loan to Michael and Gayle Lanning, at an interest rate of 6½%. The loan was secured by a deed of trust to the Lannings' home. Appellee American Securities Company was named as the trustee. On January 23, 1970, appellants purchased the property for $34,000, for use as a family home. They agreed to assume the Lannings' obligations. The bank determined that appellants were good credit risks. It insisted, however, on exercising a "due-on-sale" clause (accelerating the balance of the loan) unless appellants would agree to an increase in the interest rate to 9¼%. Appellants advised the bank that they believed the demand was improper. Appellants said

they were prepared to litigate the question if necessary, and they offered to take any reasonable steps to protect the bank's security interests during the litigation. To this date, appellants have tendered, and the bank has accepted, every monthly payment that was due under the 1967 note.[1]

On June 9, 1970, the bank caused the county recorder to record a "notice of default," in which the bank alleged a default under the "due-on-sale" clause and declared its election to sell the property. There was no notice of any opportunity to be heard. Neither the original borrowers nor appellants knowingly, intelligently or voluntarily authorized the nonjudicial procedure at any time.

The bank's action forced appellants to seek injunctive relief in order to delay the sale until after they could litigate the alleged default. At that time, California courts believed that they were prohibited by 12 U.S.C. § 91 from enjoining foreclosure sales by national banks. *See, e.g.,* Appendix A at 5 n.5. Appellants therefore were forced to seek relief from the *federal* courts. On September 4, 1970, appellants filed a federal action for injunctive and declaratory relief and damages. They "alleged that the Bank was acting under the color and authority of the California Civil Code, §§ 2932 and 2924-2924d (governing extra-

[1]The California Supreme Court recently upheld appellants' legal contention. It ruled that a bank's use of a "due-on-sale" clause under similar circumstances is an illegal restraint on alienation. *Wellenkamp v. Bank of America,* 21 Cal.3d ....., 148 Cal.Rptr. ....., 582 P.2d ..... (August 25, 1978).

judicial sales of real property security) and that these sections are unconstitutional on their face and as applied in this case. . . ." *Garfinkle v. Wells Fargo Bank,* 483 F.2d 1074, 1077 (9th Cir. 1973).

The District Court dismissed the action; but the Ninth Circuit reversed, holding that appellants had raised a substantial federal question. *Id.* at 1076-1077. It also ordered abstention and directed appellants to file an action in state court. *Id.* at 1078. On remand, the bank stipulated that it would not sell the property until "final disposition" of the state litigation. Joint Certificate of Counsel, Case No. C-70-1909WHO (N.D. Cal. April 28, 1975).

Appellants brought an action for injunctive and declaratory relief and damages in the Contra Costa County Superior Court. They challenged the bank's use of the "due-on-sale" clause, and they alleged that "use of the nonjudicial foreclosure procedure, authorized, encouraged and endorsed by Civil Code § 2924 et seq. . . . , violates the fifth and fourteenth amendments to the United States Constitution . . . ." Appellants also alleged that the bank used the procedure maliciously and oppressively.[2]

[2]The bank has clouded appellants' title (effectively preventing sale or secondary financing) and threatened a foreclosure sale for more than 8 years. (Appellants' family has outgrown the home. They recently moved and are renting the clouded property to their relatives.) The bank has never asserted any need for using this procedure. To the contrary, it repeatedly offered to cancel the "notice of default" in return for collateral advantages in the "due-on-sale" clause litigation. Then, on August 28, 1978, the bank suddenly scheduled a foreclosure sale for the sole purpose of avoiding retroactive application of the Supreme Court decision that should control the "default" issue. *See* pages 6-7, *infra.*

The trial court determined that appellants had stated a valid cause of action on the "default" issue and certified the litigation as a class action. The court sustained the bank's demurrer as to the constitutional challenge. On February 23, 1977, the court reaffirmed and explained its determination that there was no Due Process violation. Appendix D.

Appellants then initiated this original proceeding in the California Court of Appeal, seeking a writ of mandate, pursuant to Code of Civil Procedure § 1085, to compel the superior court to reinstate the constitutional challenge. The Court of Appeal summarily denied the petition, Appendix E; but the California Supreme Court granted a hearing and issued an alternative writ. Appendix A at 5 n.4. The Supreme Court filed its opinion denying relief on May 16, 1978. It held that the nonjudicial foreclosure procedure is "immune" from the Due Process Clause of the United States Constitution. Appendix A at 17.

On May 31, 1978, appellants filed a timely Petition for Rehearing, alleging that the opinion was inconsistent with the principles announced in *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (May 15, 1978). On June 15, the California Supreme Court denied the rehearing. Appendix B. This made the judgment denying a writ of mandate final. *Cf. Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476-487 (1975).

On August 25, 1978, the California Supreme Court upheld appellants' contention that there has not been any default. It held that use of a "due-on-sale" clause

in similar circumstances is an illegal restraint on alienation. *Wellenkamp v. Bank of America,* 21 Cal. 3d ....., 148 Cal.Rptr. ....., 582 P.2d ..... The Supreme Court added that "given the importance of stability of real estate titles," the ruling does not apply where a foreclosure sale has occurred before the decision is final. Shortly thereafter, appellees stapled "notices of sale" on appellants' house, declaring that the property would be sold by nonjudicial foreclosure on September 22—2 days before *Wellenkamp* normally would become final, Calif. Rules of Ct., Rule 24(a). In doing so, they breached the agreement that they would not attempt to foreclose until "final disposition" of the pending state litigation. *See* page 5, *supra.*

2. California's nonjudicial foreclosure procedure.

This action challenges California's nonjudicial foreclosure procedure as being a denial of Due Process. The procedure causes loss of all rights and interests in a family home, pursuant to "a comprehensive statutory scheme regulating in detail all aspects of the nonjudicial foreclosure process." Appendix A at 12. A creditor who believes there has been a default, on a loan secured by a trust deed or a mortgage, has the option of using judicial remedies or of proceeding nonjudicially pursuant to a "power of sale." Where a trust deed is used, the participants are: (1) the trustor (the property owner); (2) the beneficiary (the creditor); (3) the trustee; (4) the purchaser at the trustee's sale (who usually is also the beneficiary); and (5) various government officials.

The procedure works as follows: (1) The beneficiary or the trustee prepares a "notice of default," which alleges that a breach has occurred and declares the beneficiary's election to sell the property. Civil Code § 2924. (2) The "notice of default" is recorded by the county recorder in the official public record and mailed to interested persons. Civil Code §§ 2924, 2924b. (3) The property owner is given three months to pay the money alleged to be due. Civil Code §§ 2924, 2924c. (4) The trustee gives 20 days notice of sale and then sells the property at a public auction. Civil Code §§ 2924, 2924f-2924h. (5) The county recorder perfects the title by recording the new deed. *See Gwin v. Calegaris*, 139 Cal. 384, 387, 73 Pac. 851, 852 (1903). (6) This deprives the homeowners "of all incidents [of ownership], including the right of possession, free from all claims on the part of the trustors." *Central Sav. Bank v. Lake*, 201 Cal. 438, 448, 257 Pac. 521, 525 (1927). (7) The purchaser brings a summary unlawful detainer action in order to get possession of the property. Appendix A at 7-8; Code Civ. Proc. § 1161a(3). (8) The court issues a writ of restitution to the purchaser and awards up to treble damages for the failure to leave after the sale. Code Civ. Proc. § 1174(a)-(b). (9) Government law enforcement officers serve the writ of restitution, commanding the surrender of possession. Code Civ. Proc. § 1174(d). (10) If the occupant does not vacate within five days, "the enforcing officer shall remove the tenant [the 'former' owner] from the premises and place the plaintiff in possession thereor." *Ibid.*

The procedure also is "inconsistent with the general policy of requiring all forced sales to be subject to redemption." *Sacramento Bank v. Alcorn*, 121 Cal. 379, 384, 53 Pac. 813, 814 (1898). Consequently, there is little incentive to bid a fair price, and the homeowner typically loses the entire equity (which in inflationary periods is often greater than the loan). *See, e.g., Gonzales v. Gem Properties, Inc.*, 37 Cal.App.3d 1029, 1032, 112 Cal.Rptr. 884, 886 (1974) (home sold for $691.88); Comment, *California's Nonjudicial Foreclosure Notice Requirements and "The Sniadach Progeny,"* 9 Cal. West. L. Rev. 290, 300 & n. 81 (1973).

The only judicial hearing is in the unlawful detainer proceedings, in which the purchaser must only prove that the statutory procedure has been followed. The California Supreme Court has characterized the summary proceeding as not providing a "fair opportunity to litigate" the allegation that there has been a default. *Vella v. Hudgins*, 20 Cal.3d 251, 255-257, 572 P.2d 28, 30-31 (1977). The only way a homeowner can obtain a hearing *prior* to the foreclosure sale is to bring an independent lawsuit and attempt to enjoin the sale. Without the benefit of discovery, the *owner* must prove that "there is a reasonable probability that plaintiff will be successful" at the full trial. *Weingand v. Atlantic Sav. & Loan Assn.*, 1 Cal.3d 806, 820, 464 P.2d 106, 113 (1970). Even then, injunctive relief is discretionary. *Ibid.* The homeowner also must post a bond. Code Civ. Proc. § 529. By contrast, the beneficiary is not required to post

any security or to prove anything at all. *See generally* Hetland, SECURED REAL ESTATE TRANSACTIONS (Calif. Cont. Ed. of the Bar, 1974) at 151, 161-168.[3]

THE QUESTIONS ARE SUBSTANTIAL

I. INTRODUCTION

Each year thousands of California families lose their most prized possessions through California's nonjudicial foreclosure procedure.[4] Because the price at the non-redeemable sale is almost always near the amount of the remaining balance of the loan, the homeowners also lose their accumulated equity. Appellants request a meaningful opportunity to defend their property before they suffer such losses. Applying the "state action" doctrine, the California Supreme Court has ruled that the procedure is "immune" from Due Process requirements, Appendix A at 17; *i.e.*, there is *no constitutional right to defend one's home or equity* when a national bank uses the State's procedures, laws, records, courts and law enforcement officers to take away those basic interests.

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[3]In *Vella v. Hudgins*, the homeowner brought an independent action, but her request for an injunction was denied. She then attempted to defend the unlawful detainer action. The court rejected her defense that the "default" was fraudulently induced, and she was evicted. Even though she subsequently *proved her defense* in the independent action, she was denied possession or use of the property for *more than 8 years* before the judgment restoring the premises could be made final. *See also Gonzales v. Gem Properties, Inc.*, 37 Cal.App.3d 1029, 112 Cal.Rptr. 884 (1974) (homeowner evicted and out of possession for at least 5 years, and perhaps forever, despite valid defense).

[4]From 1965 to 1970, *in Los Angeles County alone*, there were 137,507 "notices of default" and 56,194 nonjudicial foreclosure sales. Comment, 9 Cal. West. L. Rev. at 300.

This denial of the right to Due Process raises substantial questions regarding: (1) the principles established in *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (*see* Section II-A); (2) the pervasive governmental involvement (*see* Section II-B); and (3) the use of adhesion contracts to insulate remedies from Due Process (*see* Section II-C). The opinion below also conflicts with the three-judge court decision in *Turner v. Blackburn*, 389 F.Supp. 1250 (W.D. N.C. 1975), and *Garner v. Tri-State Development Co.*, 382 F.Supp. 377 (E.D. Mich. 1974), both of which found "state action" and a right to Due Process in nonjudicial foreclosure. On the other hand, several courts have found an absence of "state action." *See* cases cited below, Appendix A at 2 & n. 1.

It is particularly important to implement the principles announced in *Flagg Brothers* and to alleviate uncertainty as to when citizens have a right to Due Process. The Court should make it clear that its Due Process decisions cannot be circumvented by according even *less* protection to property owners. *See* dissent by Mr. Justices Stevens, White and Marshall, 98 S.Ct. at 1743.

II. CALIFORNIA'S PROCEDURE IS NOT "IMMUNE" FROM DUE PROCESS

A. There is a right to Due Process when a bank uses California's statutes, procedures, records, courts and law enforcement officers to coerce the surrender of possession and all other interests in a family home.

In *Flagg Brothers*, a 5-3 majority ruled that there is no "state action" when a warehouseman sells personal property subject to a possessory lien.[5] Mr. Justice Rehnquist's majority opinion stated that the creditor *already* had possession and was merely transferring title in accordance with state law. The opinion stressed that there was a "total absence of overt official involvement." 98 S.Ct. at 1734 & n.5. In particular,

> no state officials or process were *ever* involved in enforcing . . . that body of law.
>
> This situation is clearly distinguishable from [*North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).] In each of those cases *a government official participated in the physical deprivation* of what had concededly been the constitutional plaintiff's property . . . . The constitutional protection attaches not because . . . a clerk issued a ministerial writ out of the court, but because *as a result* of that writ the property of the debtor was seized and impounded *by the affirmative command of the law of Georgia.* The creditor . . . had *invoked the authority* of the Georgia court . . . .
>
> 98 S.Ct. at 1736 n. 10 (emphasis added).
>
> It may well be . . . that "[t]he power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system." [Citation.] *But here New York . . . has not ordered respondent to surrender any property whatever.*
>
> *Id.* at n. 11 (emphasis added).

Unlike New York in *Flagg Brothers,* California statutes, officials and court process compel the surrender of the family home. The trustee is required by statute to sell the property. A county official records the mandatory "notice of default" and perfects the change of title. California law extinguishes the trustor's right to possession. Most importantly, California provides a summary judicial process, and the full power of its law enforcement machinery, to command and effectuate the surrender of possession.

The opinion below discounted the eviction process:

> The fact that a purchaser who has acquired rights by virtue of a trustee's deed, like a party who has acquired rights under any other type of contract, may have a right to resort to the courts in order to enforce such previously acquired contractual rights when that becomes necessary, is not sufficient to convert the acts creating these contractual rights into state action. For to hold otherwise, would be to subject every private contract to review under the Fourteenth Amendment.
>
> Appendix A at 16.

[5] Mr. Justice Brennan did not participate. The dissenters, Mr. Justices Stevens, White and Marshall, apparently would have applied Due Process principles in all coercive dispute-resolution between debtors and creditors. 98 S.Ct. at 1739-1745.

This rejection of the enforcement and coerced surrender of possession is inconsistent with *Flagg Brothers; Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 178-179 (1972) ("the result . . . would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule"); *Griffin v. Maryland,* 378 U.S. 130, 136 (1964) ("to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State . . . violates the Fourteenth Amendment"); *Shelley v. Kraemer,* 334 U.S. 1, 13-14, 19-20 (1948) (by enforcing a private contract, "the States have made available to such individuals the full coercive power of government"). In fact, *every one of this Court's debtor Due Process cases* involved the enforcement of a contract between the debtor and the creditor. This does not mean that every private contract is reviewable under the Fourteenth Amendment. It is only the *enforcement procedure* that must satisfy Due Process. The summary eviction process (unlike other actions to enforce contract rights) does not provide a "fair opportunity to litigate" *bona fide* defenses. *Vella v. Hudgins.* It is a *fundamental part of the total process,* by which *all* rights and interests are stripped away, *all* without Due Process of Law. This reality was underscored by *Vella v. Hudgins* and *Gonzales v. Gem Properties, Inc.* Without the summary eviction process, the homeowners would have been able to prove their defenses in suits for ejectment before the State threw them off the property.

Flagg Brothers compels reversal even if we disregard the State's enforcement. The opinion below recognized that the recorder participates in the procedure prior to the vesting of title. Appendix A at 6-7, 15. It concluded, however, that:

> . . . the acts of the county recorder required by the California nonjudicial foreclosure statutes are ministerial in nature, and are thus distinguishable from the significant, discretionary acts of the county recorder [in *Turner v. Blackburn*].
>
> *Id.* at 15.

Flagg Brothers declared that "state action" is present when an official act has a significant "result," regardless of whether it is "ministerial" or "discretionary." 98 S.Ct. at 1736 n. 10. The trustee is required by statute to carry out the trust, Civil Code § 2258, and to do so in accordance with "a comprehensive statutory scheme regulating in detail all aspects of the nonjudicial foreclosure process," Appendix A at 12. As a *result* of the sale (by a trustee acting under statutory compulsion) and the perfection of title (by the county recorder), all of the homeowner's interests are extinguished by California law. Civil Code § 1214; *Central Sav. Bank of Oakland v. Lake.* In particular, *"upon recording of this deed,* the purchaser is entitled to bring an unlawful detainer action against the trustor in order to get possession of the property." Appendix A at 7-8 (emphasis added).[6]

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[6]The recording of the "notice of default" also is significant. It is a statutory condition precedent to the sale. Civil Code § 2924. The public record effectively prevents homeowners from selling the property or obtaining the secondary financing that might enable them to reinstate the loan. The opinion below says that "the recorded notice of default . . . does not constitute

Finally, in *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 416, 422-425 (1915), and *Scott v. Paisley,* 271 U.S. 632 (1926), this Court applied Due Process scrutiny to the forced sale of real property. While *Coe* and *Scott* involved sales by a sheriff under court process, it does not matter which branch of government causes the deprivation. *Flagg Brothers,* 98 S.Ct. at 1738. There is no difference here, where the Legislature commands the trustee to sell the property, under procedures detailed by statute and backed by the full power of the State. Indeed, the *creditors' agents* served the garnishment papers in *Sniadach* and *North Georgia Finishing,* and the deprivations were effected solely because of the legal authority that stands behind such acts. The critical factor is that the creditor has "invoked the authority of the [State]" to coerce the surrender of property. *Flagg Brothers,* 98 S.Ct. at 1736 n. 10.

B. The government is actively and pervasively involved in the deprivation.

This Court repeatedly has ruled that "private" acts may be attributed to the State where there is significant government involvement. *E.g., Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) (private restaurant leasing government property); *Gilmore v. City of Montgomery,* 417 U.S. 556, 573-574 (1974) (private groups using city facilities for segre-

constructive notice of any adverse claim . . . . (§ 2924b, subd. (5), as amended.)" Appendix A at 7 n. 11. This is an inexplicable misreading of the cited section, which deals only with a *request for a copy* of the notice of default, not with the notice itself.

gated activities). The State of California is so pervasively involved that its highest court refers to the process as "*California's* nonjudicial foreclosure procedure." Appendix A at 1, 2, 4, 17 (emphasis added); *cf. United States v. Brosnan,* 363 U.S. 237, 250, 259 (1960) (majority and dissent) ("the state procedure"). The State's involvement far exceeds that in *North Georgia Finishing* and the other cases that apply Due Process principles:

(1) The California Supreme Court and Legislature have authorized nonjudicial foreclosures. *Koch v. Briggs,* 14 Cal. 256 (1859); Civil Code §§ 2220, 2920, 2932; *Sacramento Bank v. Alcorn,* 121 Cal. at 384-385, 53 Pac. at 814-815. *But cf. Flagg Brothers,* 98 S.Ct. at 1738 (State authorization, *by itself,* is not sufficient).

(2) The Legislature *requires* that the trustee fulfill the purposes of the trust and complete the sale. Civil Code §§ 2258, 2924h(c). The highest bidder is compelled, by criminal sanction, to complete the purchase. § 2924h(c). *Compare Flagg Brothers,* 98 S.Ct. at 1737-1738; *Moose Lodge,* 407 U.S. at 177-179.

(3) The county recorder and government-maintained facilities and records are *required:* (a) to make the "notice of default" (including the election to sell) a matter of public record; and (b) to perfect the change in title. Civil Code § 2924; *Gwin v. Calegaris. Compare Gilmore.*

(4) The Legislature provides "a comprehensive statutory scheme regulating in detail all aspects of the nonjudicial process." Appendix A at 12.

(5) California law makes the sale effective to deprive the homeowner of "all incidents [of ownership], including the right of possession, free from all claims on the part of the trustors." *Central Sav. Bank of Oakland v. Lake.*

(6) The State provides a summary process for evicting the homeowners without first according a "fair opportunity to litigate" defenses. Code Civ. Proc. § 1161a(3); *Vella v. Hudgins.*

(7) The courts issue writs of restitution and award up to treble damages if the homeowners do not leave after the sale. Code Civ. Proc. § 1174(a)-(b).

(8) Law enforcement officers serve the writs of restitution, commanding the homeowners to surrender the property. Code Civ. Proc. §§ 1174(d).

(9) Law enforcement officers physically evict the homeowners and turn the property over to the adversary. *Ibid.*

(10) A homeowner may obtain a discretionary court injunction prior to the sale; however, the State requires: (a) that the homeowner prove (in a summary hearing, without discovery) that there is a "reasonable probability" of prevailing at the eventual trial and (b) that the homeowner post a bond. *Weingand;* Code Civ. Proc. § 529; Hetland (Calif. Cont. Ed. of the Bar) at 161-168.

(11) California "abdicate[s] effective state control over state power", *Fuentes,* 407 U.S. at 93 (Stewart, J.), by permitting creditors to circumvent the State's Due Process obligations. *See* Miller & Starr, CURRENT LAW OF CALIFORNIA REAL ESTATE (1975 ed.) at § 3.1, p. 315: "The deed of trust was utilized . . . to avoid the procedural inhibitions . . . and the impediments attendant with judicial foreclosure . . . ."

(12) Wells Fargo is a national bank, an "instrumentality" of the federal government. *Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 558 (1963). It is enforcing a contract offered to the general public on a commercial basis. *Compare Runyon v. McCrary,* 427 U.S. 160, 187-188 (1976) (Powell, J., concurring). The foreclosure sale also is open to the public. *Compare Moose Lodge,* 407 U.S. at 175 ("a private social club in a private building"), *with Burton* and *Gilmore.*

(13) Statutes provide that the beneficiary may enforce the trust, Civil Code § 863; that the trustee's recitals are conclusive evidence that proper notice has been given, § 2924; that the sale is *not* affected by the trustee's failure to comply with significant statutory requirements, §§ 2924c(b)(2), 2924f; and that the beneficiary may unilaterally substitute a new trustee, despite a contrary provision in the trust deed, § 2934a.

(14) Paraphrasing *Gilmore,* 417 U.S. at 569: the State's involvement completes the process, enhances the attractiveness of the procedure, results in savings, provides the opportunity to generate revenue, and otherwise significantly aids an institution that provides essential services to the public but also deprives families of their homes without Due Process.

> [In sum, there] are so many incentives, so many encouragements, by the state, its courts, its court attaches, and its political subdivisions in assist-

ing a creditor utilizing the expeditious and efficient legislative scheme of nonjudicial foreclosure, that simply describing them could go on indefinitely.

Hetland (Calif. Cont. Ed. of the Bar) at 154-155.

C. "Authorization" by adhesion contract does not mean that there is no "state action."

The primary theme of the opinion below (and of nearly every other decision that has found an absence of "state action") is that the creditor's remedy derives from a "private contract." *See* Appendix A at 10-17; *Northrip v. Fed. Nat. Mrtg. Assn.*, 527 F.2d 23, 27-29 (6th Cir. 1975), and cases cited therein. But *Flagg Brothers* declared that the "consent" inquiry relates to the "waiver" issue, not to whether there is "state action." 98 S.Ct. at 1736 n. 10. *See also id.* at 1738 (the source of the "authorization" is "quite immaterial").

If "state action" is otherwise present, the fact that the bank has inserted an "authorization" into its contract form cannot make the government's involvement vanish. By definition, every one of the Court's *debtor-creditor* decisions involved either an express or implied contract. The Court has repeatedly ruled that relevant statutory and common law enforcement procedures are read into and become an essential ingredient of such contracts. *E.g., Hendrickson v. Apperson*, 245 U.S. 105, 112 (1917), and authorities cited therein. Due Process has been applied even though a contract *explicitly* "authorized" the questioned procedure.

Fuentes v. Shevin; D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); *cf. Shelley v. Kraemer*, 334 U.S. at 20 ("Nor is the Amendment ineffective simply because the particular pattern of discrimination . . . was defined initially by the terms of a private agreement").

Moreover, the assertion that the remedy is "contractual" begs the question. The pleadings allege that the contract is adhesive and that neither the original borrowers nor appellants have ever waived their rights or otherwise authorized the procedure. The California Supreme Court said that this contention is not relevant. Appendix A at 19 n. 20. If contractual authorization means that there is no right to defend a home, then justice demands that we be permitted to show that there has been *no valid* authorization.

III. CALIFORNIA'S NONJUDICIAL FORECLOSURE PROCEDURE VIOLATES DUE PROCESS REQUIREMENTS[7]

The nonjudicial foreclosure procedure violates principles repeatedly applied by this Court. *See, e.g., Coe v. Armour Fertilizer Works*, 237 U.S. at 422-425 (discretionary stay of real property sale cannot "be deemed a substantial substitute for the due process

[7]If this Court determines that there is "state action" and a right to Due Process, it may remand the case to the California Supreme Court with instructions to determine whether Due Process requirements have been violated. The opinion below did not address the question. The California Supreme Court probably would reconsider its "state action" analysis under the *California* Constitution in light of this Court's determination. *See* Appendix A at 18-19. That would provide an independent State ground for granting appellants' relief.

of law that the Constitution requires"); *Memphis Light, Gas & Water Division v. Craft,* 98 S.Ct. 1554, 1565-1566 (1978) ("The injunction remedy . . . would not be an adequate substitute" for right to prior hearing); *North Georgia Finishing,* 419 U.S. at 607 (prehearing garnishment unconstitutional where: (1) "without participation by a judge;" (2) "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment;" and (3) requirement that debtor file a bond); *Fuentes v. Shevin,* 407 U.S. 67 (requiring prior hearing except in extraordinary circumstances). All of these authorities apply here.[8]

The Due Process challenge is stronger than those in *North Georgia Finishing, Fuentes* and *Sniadach,* which invalidated "temporary" deprivations that creditors argued were necessary to preserve their security until a court hearing. Nonjudicial foreclosure sales *extinguish* all rights and interests, subject only to a summary eviction process that does not provide a "fair opportunity to litigate" whether there has been a default. Creditors use the nonjudicial remedy *precisely to avoid any such hearing,* as well

[8]Five recent federal decisions have held that nonjudicial foreclosures of real property were unconstitutional. *United States v. White,* 429 F.Supp. 1245, 1250-1253 (N.D. Miss. 1977); *Ricker v. United States,* 417 F.Supp. 133 (D. Me. 1976); *Turner v. Blackburn,* 389 F.Supp. 1250, 1259 (W.D. N.C. 1975) (*three-judge court*); *Garner v. Tri-State Development Co.,* 382 F.Supp. 377, 379-380 (E.D. Mich. 1974); *Northrip v. Fed. Nat. Mortgage Assn.,* 372 F.Supp. 594, 599-600 (E.D. Mich. 1974), *rev'd on other grounds,* 527 F.2d 23 (6th Cir. 1975). *Contra, U.S. Hertz, Inc. v. Niobrara Farms,* 41 Cal.App.3d 68, 87, 116 Cal.Rptr. 44, 57 (1974) (injunction remedy satisfies Due Process).

as to appropriate the homeowner's equity through unsupervised sales that are not subject to redemption.

It is not necessary to declare that nonjudicial foreclosure sales are *inherently* unconstitutional. The right to be heard may be waived. *Fuentes,* 407 U.S. at 92-96. A nonjudicial sale may occur after a judgment or order authorizing the sale, as in *Scott v. Paisley,* 271 U.S. at 632-635 & n. 1. (*Scott's dicta* that powers of sale are valid does not dispense with the need for a meaningful opportunity to defend against the alleged default.) The problem here is that California offers no meaningful opportunity to defend a family home where a bank makes a legally erroneous allegation that there has been a default and then invokes the State's procedure—including the full power of its law enforcement machinery—to strip away all rights and interests in that home.

IV. AT A MINIMUM, THE CALIFORNIA SUPREME COURT SHOULD BE REQUIRED TO RECONSIDER IN LIGHT OF FLAGG BROTHERS.

The opinion below was rendered without considering the decision in *Flagg Brothers.* The California Supreme Court then denied a Petition for Rehearing, refusing to reconsider in light of this Court's controlling pronouncements. If this Court elects not to order full briefing and argument, we ask that the case at least be remanded to the California Supreme Court, with instructions to reconsider in light of the guidelines that were identified for the first time in *Flagg Brothers.*

CONCLUSION

The Court has jurisdiction, and the case involves substantial questions that require full briefing and argument. Alternatively, appellants request that the case be remanded for reconsideration in light of *Flagg Brothers, Inc. v. Brooks.*

Respectfully submitted,

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September 1978

(Appendices Follow)

Appendices

Appendix A

(Reported at 21 Cal.3d 268, 146 Cal.Rptr. 208, 578 P.2d 925)

In the Supreme Court of the
State of California

S. F. No. 23658

Susan Garfinkle, et al.,
Petitioners,
vs.
The Superior Court of Contra Costa County,
Respondent;
Wells Fargo Bank, et al.,
Real Parties in Interest.

[Filed May 16, 1978]

OPINION

This petition for writ of mandate challenges the constitutionality of California's procedure for the nonjudicial foreclosure of deeds of trust on real property. Petitioners contend that this procedure permits the deprivation of the trustor's property without adequate notice or hearing in violation of the due process guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, section 7 of the California Constitution. We conclude, in agreement with the decisions which have considered this

question in relation to California's nonjudicial foreclosure procedure (Strutt v. Ontario Sav. & Loan Ass'n (1972) 28 Cal.App.3d 866, 105 Cal.Rptr. 395; *U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal. App.3d 68, 116 Cal.Rptr. 44; *Davidow v. Corporation of America* (1936) 16 Cal.App.2d 6, 60 P.2d 132; *Davidow v. Lachman Bros. Inv. Co.* (9th Cir. 1935) 76 F.2d 186; *Lawson v. Smith* (N.D.Cal.1975) 402 F.Supp. 851) and in accord with the overwhelming majority of decisions which have considered this question in relation to similar nonjudicial foreclosure procedures of other jurisdictions,[1] that California's procedure constitutes private, not state action and is therefore exempt from the due process constraints of the federal Constitution. We also conclude that the private action herein involved does not satisfy the state action requirement of the due process clause of the state Constitution.

In January 1970, petitioners Susan and Gary Garfinkle (the Garfinkles) purchased a family residence from the Lannings, whose loan on the property was secured by a deed of trust in favor of Wells Fargo Bank (Bank). This deed of trust contained a standard due-on-sale clause which provided that

[1]*Kennebec, Inc. v. Bank of the West* (1977) 88 Wash.2d 718, 565 P.2d 812; *Federal National Mortgage Ass'n v. Howlett* (Mo. 1975) 521 S.W.2d 428; *Coffey Enterprises & Co. v. Holmes* (1975) 233 Ga. 937, 213 S.E.2d 882; *Armenta v. Nussbaum* (Tex.Civ.App. 1975) 519 S.W.2d 673; *Levine v. Stein* (4th Cir. 1977) 560 F.2d 1175; *Barrera v. Security Building & Investment Corporation* (5th Cir. 1975) 519 F.2d 1166; *Northrip v. Federal Nat. Mtg. Ass'n* (6th Cir. 1975) 527 F.2d 23; *Bryant v. Federal Savings and Loan Ass'n* (1974) 166 U.S.App.D.C. 178, 509 F.2d 511.

the bank could accelerate the balance due on the loan if the Lannings sold the property without the written consent of the Bank. The deed of trust also contained a power of sale clause which provided in part as follows: "If default be made in the payment of said promissory note . . . or in case any change is made in the title to all or any part of the said property . . . all sums hereby secured shall, at the election of the Bank, forthwith become due and payable, without notice, and the Bank may cause the said property to be sold in order to accomplish the object of these trusts, and upon demand of the Bank the Trustee shall sell the whole, or such portion of the said property as the Trustee shall deem necessary to accomplish the purposes of these trusts, and such sale may be made in any manner provided by law, and if none is provided, then by first giving notice of the time and place of sale in the manner and for a time not less than that now required by law for the sale of real property on execution . . . ."

The Bank offered to let the Garfinkles assume the Lanning loan at an increased rate of interest in return for the Bank's agreement not to accelerate the balance due on that loan pursuant to the due-on-sale clause. The Garfinkles refused to assume the Lanning loan on these terms. Thereafter, the Bank notified both the Lannings and the Garfinkles that it had accelerated the Lanning loan and that the balance owing thereon was due and payable in its entirety. In June 1970 when the balance due had not been paid, the Bank recorded its notice of default as required by

section 2924 of the Civil Code. The Lannings and Garfinkles received actual notice of the Bank's notice of default. The Garfinkles then brought a series of legal actions[2] challenging both the constitutionality of California's nonjudicial foreclosure procedure and the validity of the automatic enforcement of the due-on-sale clause; and culminating in the present action seeking declaratory relief on both of these issues in respondent Contra Costa County Superior Court. The Bank filed a general demurrer to the Garfinkles' complaint. Respondent sustained the demurrer without leave to amend as to the constitutional challenge to the nonjudicial foreclosure procedure on the ground that no state action was involved.[3]

[2]Petitioners first brought an action for declaratory and injunctive relief in the United States District Court for the Northern District of California. This action was dismissed for want of subject matter jurisdiction. Petitioners appealed this judgment of dismissal and the Ninth Circuit Court of Appeals reversed, holding that petitioners had raised a substantial federal question. (*Garfinkle v. Wells Fargo Bank* (9th Cir. 1973) 483 F.2d 1074.) After observing that *Strutt v. Ontario Sav. & Loan Ass'n, supra,* 28 Cal.App.3d 866, 105 Cal.Rptr. 395, was not dispositive of all of the constitutional issues presented by the Garfinkles, the Ninth Circuit ordered the district court to abstain and directed the Garfinkles to file an action in state court to resolve the issues. Petitioners thereupon filed a petition for an original writ of mandate in the California Court of Appeal which was denied on the ground that insufficient reason was shown why the action should be heard by the reviewing court and not by the lower court. (Cal. Rules of Court, rule 56(a)(1). After their petition for hearing was denied by this court, petitioners commenced the present action in superior court.

[3]Respondent overruled the Bank's demurrer as to the cause of action challenging the validity of the automatic enforcement of the due-on-sale clause. That question, which is presently before this court in *Wellenkamp v. Bank of America,* L.A. 30776 (hg. granted May 5, 1977), is thus not at issue in the instant petition. Respondent has not yet taken any action on petitioners' motion to maintain this action as a class action, and therefore, that issue is also not before us in this proceeding.

After decision by this court in *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, 132 Cal.Rptr. 477, 553 P.2d 637, in which we held that California's mechanic's lien and stop notice laws constituted state action, respondent, at the Garfinkles' request reconsidered its previous ruling on the state action question. Respondent then entered a new order, again sustaining the demurrer without leave to amend.[4] By this petition for mandate the Garfinkles seek review of the trial court's order.[5]

The statutory provisions regulating the nonjudicial foreclosure of deeds of trust on real property are contained in Civil Code sections 2924-2924h.[6] Basically, these provisions require that before the trustee, acting under a power of sale contained in the deed of trust,

[4]In view of the fact that petitioners had no immediate remedy by appeal, and because of the broad public interest in the merits of the constitutional question presented, we granted a hearing and issued an alternative writ of mandate following the denial of a petition for writ of mandate by the Court of Appeal.

[5]Throughout the protracted course of this litigation the Bank has voluntarily refrained from selling the Garfinkle's home and has agreed to accept monthly payments from the Garfinkles under the terms of the Lanning loan until this litigation is resolved. Until recently it was thought that federal law prohibited a state court from enjoining a national bank such as Wells Fargo prior to final judgment in any state court action. (12 U.S.C., § 91; *Crocker Nat. Bank v. Superior Court* (1977) 68 Cal.App.3d 863, 872, 136 Cal.Rptr. 481.) The United States Supreme Court, however, has made clear that 12 United States Code section 91 does not apply to a debtor's action seeking a preliminary injunction against a national bank to protect his real property from wrongful foreclosure. (*Third National Bank v. Impac Limited, Inc.* (1977) 432 U.S. 312, 97 S.Ct. 2307, 53 L.Ed.2d 368.) Therefore, this remedy coupled with an action for declaratory relief on the question of default is now available to protect against a trustee's sale of the trustor's property while the question of default is being litigated.

[6]All references are to the Civil Code unless otherwise indicated.

can sell the subject trust property, the trustee must first record a notice of default setting forth the nature of the default and the election to exercise the power of sale. (§ 2924.)[7] If the trustor (borrower) has recorded a request for notice or if the deed of trust contains a request for notice,[8] the trustee is required to mail a copy of the notice of default to the trustor at the address specified in the recorded request or in the deed of trust. (§ 2924, subd. (b).)[9]

[7]Section 2924 provides in relevant part: "Where . . . in any transfer in trust made after July 27, 1917, of [specified estates in real property] . . . a power of sale is conferred upon the . . . trustee, or any other person, to be exercised after a breach of the obligation for which such . . . transfer is a security, such power shall not be exercised . . . until (a) the trustee . . . or beneficiary, shall first file for record, in the office of the recorder of each county wherein the . . . trust property or some part or parcel thereof is situated, a notice of default, . . . setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation, . . . (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the . . . trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in section 2924f. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrances for value and without notice."

[8]In 1972, section 27321.5 of the Government Code was amended to require that all deeds of trust and mortgages with a power of sale upon real property must specify the trustor's address and contain a request for a copy of any notice of default and of sale.

[9]By amendment effective July 1977, section 2924b, subdivision (3)(b) requires that notice also be sent to the trustor's successor in interest, the beneficiary's assignee, the vendee of any contract of sale and lessee of any lease, or their successors in interest, of the estate being foreclosed.

After the notice of default has been recorded, the trustee must allow three months to elapse, during which time, the trustor may "cure" the default and reinstate the deed of trust, where reinstatement is possible. (§ 2924c.)[10]

Upon expiration of this 90-day period, the trustee must then post a written notice of sale in a conspicuous place on the property at least 20 days prior to the date of sale (§ 2924f), and must mail a copy of this notice of sale to the trustor if notice has been requested.[11] The trustee can then proceed to sell the property. There is no statutory provision for a judicial determination, prior to the sale, of the validity of the alleged default.

The property must be sold by public auction to the highest bidder (§ 2924h)[12] to whom title is transferred by a trustee's deed. Thereafter, upon recording of this deed, the purchaser is entitled to bring an un-

[10]By amendment, effective July 1, 1974, section 2924c, subdivision (b)(1) was added, which requires that the notice of default include a statement indicating that certain defaults may be cured, and a warning that if such defaults are not cured within the three-month period following the recording of the notice, the right to reinstatement will terminate and the property may be sold.

[11]During the 110-day period that must elapse between the recording of the notice of default and the sale of the property, the trustor's right to possession and use of the property remains undisturbed. Also, the trustor's title to the property remains unaffected by the recorded notice of default which does not constitute constructive notice of any adverse claim thereto. (§ 2924b, subd. (5), as amended.

[12]When property is sold by nonjudicial foreclosure, section 580d of the Code of Civil Procedure prohibits deficiency judgments against the trustor for the amount owed on the promissory note if that amount is greater than the amount for which the property was sold at the trustee's sale.

lawful detainer action against the trustor in order to get possession of the property. (Code Civ.Proc., § 1161a.)

Petitioners contend that this nonjudicial procedure violates procedural due process under both the federal and state Constitutions because it deprives real property owners of their property without adequate notice and without a judicial hearing, thus coming within the scope of the decisions in *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 and its progeny.[13]

We first turn to petitioner's federal constitutional claim. The Fourteenth Amendment to the United States Constitution provides in part: "No state shall

[13]With regard to the notice provisions, petitioners claim that even though all deeds of trust must now include a request for notice, this protection (which is only applicable to deeds after 1972) is often inadequate because the statute requires only that the trustee send a copy of the notice of default and sale to the address specified in the deed of trust (or in the recorded request if one has been made). If this address is no longer accurate, there is no statutory requirement that the trustee attempt to ascertain the trustor's present address (for instance, by requesting this information if it is available from the lender). Thus, petitioners and amicus California Rural Legal Assistance Foundation argue that a property owner who has moved and has neglected to record the change of address, or who was unaware that he should have requested notice in the first place, might not receive any notice of the lender's claim that he is in default, with the result that the 90-day period within which he may have a right to cure the default might elapse without his knowledge.

With regard to the lack of a judicial hearing, petitioners claim that the availability of declaratory and injunctive relief is inadequate because these collateral judicial remedies are discretionary and thus do not insure that the property owner will certainly get a hearing prior to the sale of his property. (See *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 309, 138 Cal.Rptr. 53, 562 P.2d 1302; *Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146, 156, 113 Cal.Rptr. 145, 520 P.2d 961.)

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . . ."

"The Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property, without due process of law; but it adds nothing to the rights of one citizen as against another." (*United States v. Cruikshank* (1875) 92 U.S. 542, 554, 23 L.Ed. 588.) The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161.) The question presented here, as in all actions challenged under the Fourteenth Amendment, is whether "there is a sufficiently close nexus between the state and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself." (*Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477.) Thus, the threshold question which we must determine is whether the state is significantly involved in the nonjudicial foreclosure procedure so as to bring that procedure within the reach of the due process clause.

Petitioners first contend that there is significant involvement by the state in nonjudicial foreclosures because these foreclosures are pervasively regulated by detailed statutory provisions. It is also argued that the nonjudicial foreclosure procedure when viewed as a whole, requires participation by a state official, the county recorder, and by the state courts. Petitioners

rely primarily on our decision in *Connolly Development Inc. v. Superior Court, supra,* 17 Cal.3d 803, 132 Cal.Rptr. 477, 553 P.2d 637, in support of this contention.

In *Connolly,* we held that the mechanics' lien constitutes state action because that lien not only is governed by detailed statutory provisions but also only becomes effective upon recordation with the county recorder and can only be enforced by resort to the state courts. (17 Cal.3d 803, 815, 132 Cal.Rptr. 477, 553 P.2d 637.) We also held in *Connolly* that the stop notice procedure constitutes state action because use of that procedure, which was created by statute and is governed by comprehensive statutory regulations, is encouraged and in fact only made possible by virtue of statutory authorization for its enforcement. (17 Cal.3d 803, 815, 132 Cal.Rptr. 477, 553 P.2d 637.)

There are several significant differences, however, between the creditors' remedies involved in *Connolly* and the remedy of nonjudicial foreclosure pursuant to a power of sale that is at issue in the case at bar. Unlike the mechanics' lien or stop notice which are authorized by statute and not by the contract of the parties (see also *Adams v. Department of Motor Vehicles, supra,* 11 Cal.3d 146, 153, 113 Cal.Rptr. 145, 520 P.2d 961) the power of sale exercised by the trustee on behalf of the lender/creditor in nonjudicial foreclosures is a right authorized solely by the contract between the lender and trustor as embodied in the deed of trust. (*Davidow v. Corporation of America, supra,* 16 Cal.App.2d 6, 13, 60 P.2d 132; *U. S. Hertz,*

Inc. v. Niobrara Farms, supra, 41 Cal.App.3d 68, 87, 116 Cal.Rptr. 44.) The contractual nature of the power of sale and right of the parties to include such a power in the deed of trust to be exercised in the event of a default was first recognized by this court in 1859. Noting that deeds of trust containing powers of sale were commonly utilized in this state, this court held in *Koch v. Briggs* (1859) 14 Cal. 256, that these contractual powers are valid and enforceable and that merchantable title is transferred pursuant to the exercise thereof.[14]

In 1881, this court, again recognizing the validity of nonjudicial foreclosures of deeds of trust pursuant to powers of sale contained therein, reiterated that this remedy is created by contract and that a sale conducted in accordance with the conditions of the power would result in the transfer of good title to the purchaser. (*Bateman v. Burr* (1881) 57 Cal. 480.) In so holding, the court rejected the contention that

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[14]Two years after the decision in *Koch,* this court was presented with the question whether a power of sale could also be included in a mortgage, which otherwise would require judicial foreclosure. (*Fogarty v. Sawyer* (1861) 17 Cal. 589.) We concluded that nothing in the law of mortgages in this state would prevent the mortgagor from conferring such a power of sale upon the mortgagee, a practice recognized even under the English common law. Thereafter, in 1872, the Legislature codified this common law right to include powers of sale in mortgages. (§ 2932.)

The validity of powers of sale contained in either deeds of trust or mortgages and the legal effect of the title transferred upon their exercise have also long been recognized by the United States Supreme Court. (See *Bell Mining Co. v. Butte Bank* (1895) 156 U.S. 470, 477, 15 S.Ct. 440, 39 L.Ed. 497 and *Scott v. Paisley* (1926) 271 U.S. 632, 635, 46 S.Ct. 591, 592, 70 L.Ed. 1123, wherein the court stated that "the validity of such a contractual power of sale is unquestionable.")

judicial foreclosure was the proper method of enforcing the security interest embodied in the deed of trust.[15]

In 1917, the Legislature impliedly recognized the validity of this contractual remedy when, acting under its police power, it established certain minimum standards for conducting nonjudicial foreclosures, by placing various restrictions on the creditors' exercise of the power of sale in order to protect the trustor/debtor against forfeiture. (§ 2924; *Smith v. Allen* (1968) 68 Cal.2d 93, 96, 65 Cal.Rptr. 153, 436 P.2d 65; *Strutt v. Ontario Sav. & Loan Ass'n, supra,* 28 Cal.App.3d 866, 877, 105 Cal.Rptr. 395; see also Burke & Reber, *State Action, Congressional Power and Creditors' Rights; An Essay on the Fourteenth Amendment* (1973) 47 So.Cal.L.Rev. 1, 23-28, 32.) Since that time these statutory protections have been expanded into a comprehensive statutory scheme regulating in detail all aspects of the nonjudicial foreclosure process. (See *Smith v. Allen, supra,* 68 Cal.2d 93, 96, 65 Cal.Rptr. 153, 436 P.2d 65.)

Petitioners contend that this comprehensive statutory regulation of nonjudicial foreclosures constitutes state action because it encourages and facilitates use of that remedy. This contention does not withstand examination. The nonjudicial foreclosure statutes do not authorize or compel inclusion of a power of sale

[15]We note that it was not until 1933 that the Legislature enacted section 725a of the Code of Civil Procedure so as to make available the remedy of *judicial* foreclosure of deeds of trust.

in a deed of trust or provide for such a power of sale when one has not been included by the parties. Nor do these statutes compel exercise of the power of sale. The decision whether to exercise the power of sale is a determination to be made by the creditor. The statutes merely restrict and regulate the exercise of the power of sale once a choice has been made by the creditor to foreclose the deed of trust in that manner. (*Strutt v. Ontario Sav. & Loan Ass'n, supra,* 28 Cal.App.3d 866, 877, 105 Cal.Rptr. 395; see also, *Davidow v. Corporation of America, supra,* 16 Cal. App.3d 6, 13, 105 Cal.Rptr. 395; *Barrera v. Security Building & Investment Corporation, supra,* 519 F.2d 1166, 1170; *Federal National Mortgage Ass'n v. Howlett, supra,* 521 S.W.2d 428, 432.)

We are also unpersuaded that the state encourages nonjudicial foreclosures by acknowledging the legal validity of the title transferred thereby. Mere recognition of the legal effect of the private arrangements of the lender and trustor is not sufficient to convert the acts of the lender or trustee into the acts of the state for Fourteenth Amendment purposes. As the court in *Barrera v. Security Building & Investment Corporation, supra,* 519 F.2d 1166, 1170, cogently stated: "Virtually all formal private arrangements assume, at some point, the supportive role of the state. To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase to a significant extent the constitutional line between private and state action and submit to judicial scru-

tiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect." (*Id.* at p. 1170.)

Similarly, we are not convinced that the state has encouraged or facilitated nonjudicial foreclosure by enacting comprehensive and detailed regulations governing that process. As we stated earlier, these statutory regulations were enacted primarily for the benefit of the trustor and for the greatest part limit the creditors' otherwise unrestricted exercise of the contractual power of sale upon default by the trustor.[16] For this reason, it cannot realistically be claimed that the state, by acting to protect the debtor, has thereby become the partner of the creditor so that the creditor's actions are converted into the actions of the state. (See *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; *Barrera v. Security Building & Investment Corporation, supra.*)[17]

[16]Although it is true that section 2924 provides that recitals in deeds of trust shall constitute conclusive evidence in favor of a bona fide purchaser for value that proper notice has been given, we do not think that this provision encourages and facilitates use of nonjudicial foreclosures to a degree sufficient to convert this otherwise private remedy into state action. We express no opinion, however, as to the validity and effect of this specific statutory provision.

[17]Petitioners also suggest that inasmuch as lending institutions such as Wells Fargo Bank are subject to extensive state and federal regulation and are businesses affected with the public interest, these institutions should be considered as agents of the state for procedural due process purposes. The same suggestion was considered and rejected in *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 365, 113 Cal.Rptr. 449, 521 P.2d 441, where we stated that in light of present authority, it would be unwarranted to subject banks to procedural due process require-

We also reject petitioners' contention that the nonjudicial foreclosure procedure involves significant acts of the county recorder. We agree with the decision in *Lawson v. Smith, supra,* 402 F.Supp. 851, in which it was concluded that the acts of the county recorder required by the California nonjudicial foreclosure statutes are ministerial in nature, and are thus distinguishable from the significant, discretionary acts of the county recorder under North Carolina's nonjudicial foreclosure procedure, which has been held to constitute significant state action. (See *Turner v. Blackburn* (W.D.N.C.1975) 389 F.Supp. 1250, 1258.) Other than these ministerial acts by the county recorder, we note that there is no participation or intervention by any state official or judicial officer prior to the trustee's sale and the vesting of title in the purchaser. (See *Levine v. Stein, supra,* 560 F.2d 1175.) This absence of judicial involvement represents another significant difference between the nonjudicial foreclosure of a deed of trust and the mechanics' lien and stop notice in *Connolly,* where court action was required for the enforcement of those liens. Petitioners argue, however, that although judicial intervention may not occur prior to the transfer of title, resort to the state's courts later becomes necessary because the purchaser in order to enforce the rights previously acquired at the trustee's sale ordinarily must bring an action in unlawful

ments. Petitioners have not pointed to any authority since *Kruger,* and we can find none, which would justify a present departure from that decision.

detainer against a trustor who will not voluntarily relinquish possession of the property. For this reason, it is argued that when the nonjudicial foreclosure process is viewed as a whole, the state's involvement therein becomes apparent. We disagree. The fact that a purchaser who has acquired rights by virtue of a trustee's deed, like a party who has acquired rights under any other type of contract, may have a right to resort to the courts in order to enforce such previously acquired contractual rights when that becomes necessary, is not sufficient to convert the acts creating these contractual rights into state action. For to hold otherwise, would be to subject every private contract to review under the Fourteenth Amendment. (See *Federal National Mortgage Ass'n v. Howlett, supra,* 521 S.W.2d 428, 437.)

Petitioners' final argument that state action is here involved is based upon the assertion that the state has delegated to private parties the traditional judicial function of the enforcement of liens on real property. (See *Adams v. Department of Motor Vehicles, supra,* 11 Cal.3d 146, 153, 113 Cal.Rptr. 145, 520 P.2d 961; see also *Evans v. Newton* (1966) 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373; *Marsh v. Alabama* (1946) 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.) In *Adams,* the garageman's lien law involved therein permitted the possessory lienholder to sell the owner's vehicle if the owner did not pay the amount due for repairs thereon within the specified time. Noting that at common law, the possessory lienholder had no such power of sale, we concluded that state action was involved on the ground, inter alia, that the state had delegated a power traditionally and exclusively reserved to the state. (11 Cal.3d at p. 153, 113 Cal.Rptr. 145, 520 P.2d 961.) Unlike the power of sale in *Adams,* however, the power of sale exercised by the trustee in nonjudicial foreclosure is created by contract, not by statute. Furthermore, as has been noted above, nonjudicial foreclosure under a power of sale is a remedy that has widely been used and recognized in this state for over a century. It can therefore certainly be characterized as a traditional remedy, and as such, has paralleled the foreclosure remedies provided by the state. Thus, it cannot be said that foreclosure under a power of sale has been traditionally and exclusively performed by the state.

We conclude therefore that California's nonjudicial foreclosure procedure does not constitute state action and is therefore immune from the procedural due process requirements of the federal Constitution.

We now proceed to determine whether California's nonjudicial foreclosure procedure is subject to the due process requirements of the state Constitution as set forth in article I, section 7(a) which states in part that "A person may not be deprived of life, liberty, or property without due process of law . . ."[18] We held

[18]Prior to 1974, the California due process guarantee was set forth in former article I, section 13, which also contained a number of provisions relating primarily to the rights of the criminally accused. This section provided in relevant part that "no person . . . shall be deprived of life, liberty or property without due process of law." Upon revision of the state Constitution in 1974, article I, sections 7 and 14 were added, the latter section setting forth the due process requirement in criminal cases previously contained in former article I, section 13.

in *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 366, 113 Cal.Rptr. 449, 521 P.2d 441, that California's due process clause (former art. I, § 13), like the due process clause of the Fifth Amendment to the federal Constitution, applied to state, not private action, even though a state action requirement was not expressly set forth therein. No tenable reason has been pointed out to us, and none appears, why a similar requirement of state action is not implicit in article I, section 7.[19]

Although in interpreting the scope of the due process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments (See *Kruger, supra,* 11 Cal.3d 352, 367, fn. 21, 113 Cal.Rptr. 449, 521 P.2d 441), we have found no reason to depart from those cases in the present context. We therefore conclude for the reasons set forth above in relation to petitioners' federal Constitution claim that the nonjudicial foreclosure of a deed of trust constitutes private action authorized by contract and does not come within the scope of the California due process clause.[20]

[19]Petitioners apparently suggest that the fact that the article I, section 7 due process clause, unlike former article I, section 13, was enacted as a separate provision independent from provisions relating to criminal prosecutions, which are clearly governmental action, is indicative of an intent to extend article I, section 7 to reach private action. A contrary intent, however, appears from the analysis by the Legislative Analyst in the voters pamphlet for the General Election of November 5, 1974 (p. 26), which indicates that the due process clause in question, along with several other rights contained in the federal Constitution were proposed for approval so that these same rights would also be contained in the state Constitution.

Petitioners contend, however, that even if California's due process requirements apply only to action by the state, the Legislature, pursuant to its police power, has a duty to enact such regulations as would enable Californians to enjoy their inalienable right to protect their property as guaranteed by article I, section 1,[21] of the state Constitution. Thus it is urged that the Legislature must provide by statute for adequate notice and an opportunity to be heard before the trustor's property can be sold by nonjudicial foreclosure. This contention is unconvincing. For, just as the Legislature has full power to enact regulations which limit the means by which individuals may enjoy their rights, as long as there is no interference with constitutional guarantees (see *Werner v. Southern Cal. etc., Newspapers* (1950) 35 Cal.2d 121, 125, 216 P.2d 825), so it has full power to determine what regulations it

[20]Petitioners claim that there has been no valid contractual authorization of the sale of the subject property prior to a judicial hearing on the issue of the default. This claim is based upon the adhesive nature of the deed of trust in which the power of sale was conferred on the Bank. The Garfinkles who, although they are not parties to this contract between the Lannings and the Bank, are nonetheless bound by its terms, argue that the Lannings did not knowingly and voluntarily relinquish therein their due process rights to adequate notice and judicial hearing prior to sale of their property upon default. As we have concluded that no due process rights are involved, we need not further discuss this contention.

[21]Article I, section 1 states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining, safety, happiness, and privacy." (Adopted Nov. 5, 1974.)

should enact to protect and facilitate the individual's enjoyment of such rights.[22]

We find equally unpersuasive petitioners' final contention that notice and a judicial hearing are required prior to the deprivation of the trustor's property, under the common law principle of procedural fairness. This common law doctrine, which is not applicable here, requires only a hearing before the private association or entity involved, and not the judicial hearing which petitioners herein seek. (See *Pinsker v. Pacific Coast Society of Orthodonists* (1974) 12 Cal.3d 541, 116 Cal.Rptr. 245, 526 P.2d 253; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 140 Cal.Rptr. 442, 567 P.2d 1162; *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 142 Cal.Rptr. 418, 572 P.2d 32.)

The alternative writ heretofore issued is discharged and a peremptory writ is denied.

MANUEL, J.

We concur: BIRD, C.J., and TOBRINER, MOSK, CLARK, RICHARDSON and NEWMAN, JJ.

[22]Although we are not confronted in the present case with a situation where the parties received no notice of default or of the election to foreclose under the power of sale, we note that there may be instances where the present statutory requirements may not insure that the defaulting trustor is apprised of the lender's decision to exercise the power of sale before the statutory time to cure the default expires.

Appendix B

In the Supreme Court of the
State of California

In Bank

S.F. No. 23658

Garfinkle, et al.,
Petitioners,

vs.

The Superior Court of Contra Costa County,
Respondent;

Wells Fargo Bank, et al.,
Real Parties in Interest.

Petioner's petition for rehearing DENIED.

NEWMAN, J., is of the opinion that the petition should be granted.

/s/ BIRD, Chief Justice

Filed June 15, 1978

Appendix C

In the Supreme Court of the
State of California

S.F. No. 23658

Susan Garfinkle, et al.,
Petitioners,

vs.

The Superior Court of Contra Costa County,
Respondent;

Wells Fargo Bank, et al.,
Real Parties in Interest.

NOTICE OF APPEAL

Notice is hereby given that Susan Garfinkle and Gary Garfinkle, the petitioners in this action, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the

State of California, entered herein on June 15, 1978. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Date: August 23, 1978

Respectfully submitted,

Steven M. Kipperman
Kipperman, Shawn, Keker & Brockett

Stanley J. Friedman
Friedman & Sloan

Gary Garfinkle

/s/ Stanley J. Friedman

Attorneys for Petitioners

Appendix D

In the Superior Court of the
State of California
in and for the County of Contra Costa

No. 143399

Susan Garfinkle and Gary Garfinkle, and all others similarly situated,
Plaintiffs,

vs.

Wells Fargo Bank and American Securities Company,
Defendants.

MEMORANDUM OF DECISION

The plaintiff has moved the Court to reconsider its Order sustaining a demurrer to the second cause of action without leave to amend.

The complaint attacks the due-on-sale clause in a deed of trust on the ground that a non-judicial trustee's sale deprives persons of their property without due process of law.

Plaintiff urges that the decision in *Connolly Development Inc., v. Superior Court,* 17 C. 3d 803 undermines the Court's reliance upon *Kruger v. Wells Fargo Bank,* 11 C. 3d 352.

In *Connolly,* p. 815, the Court states:

> "(3) There is no question but that the mechanics' lien involves significant state action. Not only is the lien governed by detailed statutory provisions, but it becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts."

Plaintiff has urged that recordation constitutes state action. *Connolly,* p. 816, distinguishes *Kruger* with the following statement:

> "'In contrast to the above private action, the state in the present case has not merely authorized the laborer and materialman to record a mechanics' lien, but compelled the owner, and any subsequent purchaser or encumbrancer, to recognize the priority of that lien; the state has not merely permitted the laborer and materialman to file a stop notice, but required the lender, on pain of personal liability, to withhold the claimed funds. Moreover, neither the mechanics' lien nor the stop notice can be enforced without the assistance of the state. Thus the level of state involvement here far transcends that present in the setoff and repossession cases."

The Court upheld the validity of the mechanics' lien by virtue of the following language.

> "Before recording a mechanics' lien or filing a stop notice, the claimant must serve a preliminary notice upon the owner, the contractor, and the construction lender. (Sections 3097, 3114, 3160). Upon receipt of such a notice from one not entitled to claim a lien, the owner or lender may im-

mediately file suit to enjoin the claimant from asserting his lien (Code of Civil Procedure Section 526.) By the use of a temporary restraining order if necessary (see Code of Civil Procedure Section 527), the plaintiff could secure a hearing before the lien was imposed.

Even after the lien has been recorded, or the stop notice filed, the owner in many instances could seek a mandatory injunction ordering the claimant to release the lien. (See *People v. Paramount Citrus Assn.,* (1957) 147 Cal.App. 2d 399, 413 (305 P.2d 135); 2 Witkin, California Procedure (2d Ed. 1970) pp. 1515-1516). In any event, the owner need not wait until the claimant sues to enforce the lien; the imposition of that lien, and the owner's denial of its validity, comprise a controversy sufficient to permit an immediate suit for declaratory relief. (See Code of Civil Procedure Sec. 1060) Such a declaratory relief action can claim priority on the calendar of the trial court. (Code of Civil Procedure Section 1062a). Thus by filing an action for injunctive or declaratory relief, the owner or lender can obtain a hearing, either before imposition of the lien or within a reasonable period thereafter."

Counsel in this case correctly point out that National Banks are not subject to injunctions by s[illegible] courts; however, declaratory relief procedure is available; it provides for priority on the calendar, and the petitioner's complaint encompasses an action for declaratory relief and mandamus.

It is to be noted that no lien is being created, but merely the enforcement of an already existing lien, of which Plaintiff had notice.

Plaintiff again argues that the deed of trust is an adhesion contract; however, as pointed out by the defendant, plaintiff was not a party to the deed of trust.

In *Tucker v. Lassen Savings and Loan Association,* 12 CA 3d 629, the Court held that in the case of an installment land contract executed by the borrower, the Court would look to the facts as to whether the due-on-sale clause constituted an unreasonable restraint. In *Medovoi v. American Savings and Loan Association* (hearing granted) the due-on-sale clause in a deed of trust, involving a subsequent purchaser, was held valid. In *Demey v. Joujon-Roche,* (hearing granted) the Court held that the original purchaser could recover damages against the seller holding a deed of trust containing a due-on-sale clause where the circumstances were similar to those as in *Tucker.* The Court is aware that the Supreme Court has granted a hearing in both *Medovoi* and *Demey,* and has taken that fact into consideration in this memorandum.

In this case the plaintiff was a subsequent purchaser. The notice of default in this case was recorded on June 9, 1970. The sole ground listed in the notice of default is failure to pay the entire amount due at the election of the beneficiary based upon a change in title to the property. The fact of the change in title is admitted throughout the entire file. Plaintiff has continued in possession of the property up to the present time. There is no issue to be decided at any preliminary judicial hearing.

The Court has reconsidered and come to the same decision: The demurrer to the second cause of action is sustained without leave to amend.

Dated: February 23, 1977.

/s/ Martin E. Rothenberg
Judge of the Superior Court

Appendix E

Court of Appeal of the State of California
First Appellate District

DIVISION TWO

No. 41147

Superior Court No. 143399

Susan Garfinkle, et al.,
Petitioners,
vs.
Superior Court, County of Contra Costa,
Respondent,
Wells Fargo Bank, et al.,
Real Parties in Interest.

BY THE COURT:

The petition for writ of mandate is denied.

Dated: June 10, 1977

/s/ Taylor, P.J.

Appendix F

PERTINENT CALIFORNIA STATUTES

Civil Code §863. [In] every express trust in real property, . . . [t]he beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

Civil Code §1214. Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee . . . whose conveyance is first duly recorded . . . .

Civil Code §2220. A trust in relation to real and personal property, or either of them, may be created for any purpose or purposes for which a contract may be made.

Civil Code §2258. A trustee must fulfill the purpose of the trust . . . .

Civil Code §2267. . . . [A trustee's acts] bind the trust property to the same extent as the acts of an agent bind his principal.

Civil Code §2920. Mortgage is a contract . . . .

Civil Code §2924. . . . Where, by a mortgage . . . or in any transfer in trust made . . . to secure the performance of an obligation, a power of sale is conferred . . . , such power shall not be exercised . . . until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county . . . , a notice of default, . . . containing a statement

that a breach of the obligation . . . has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation . . . ; (b) not less than three months shall thereafter elapse; and (c) . . . the mortgagee, trustee or other person authorized to make the sale shall give notice of sale . . . . A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding [such notices] shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrances for value and without notice.

Civil Code §2924b. (1) Any person . . . may . . . cause to be filed for record in the office of the recorder . . . , a duly acknowledged request for a copy of any such notice of default and of sale. . . .

(2) The mortgagee, trustee, or other person authorized to record the notice of default shall [mail copies of the notices of default and of sale to these and other specified persons within prescribed time periods.]

. . . .

(5) No request for copy of any notice filed for record pursuant to this section . . . shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property . . . .

Civil Code §2924c. (a) Whenever all or a portion of the principal sum of any obligation . . . has . . . been declared due by reason of default in payment . . . , the trustor or mortgagor or [other interested persons] at any time within three months of the recording of the notice of default . . . may . . . cure the default theretofore existing, and thereupon, . . . the obligation and deed of trust or mortgage shall be reinstated. . . .

(b)(1) The notice, of any default . . . , shall contain the following statement [of the rights and procedures provided for in this section.]

(2) Any failure to comply with the provisions of this subdivision shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice.

Civil Code §2924f. . . . Before any sale of property can be made under the power of sale . . . notice of the sale thereof must be given [in a prescribed manner and with specified information.] If a legal description of the property is given, the validity of the notice and the validity of the sale shall not be affected by the fact that the street address, other common designation, name and address of the beneficiary, or the directions obtained therefrom are erroneous . . . .

Civil Code §2924g. All sales of property under the power of sale . . . shall be made at auction, to the highest bidder . . . .

Civil Code §2924h. . . .

. . . .

(c) If the trustee has not required the last and highest bidder to deposit the cash or equivalent [at the auction], the trustee shall complete the sale. If the last and highest bidder then fails to deliver to the trustee, when demanded, the amount of his final bid . . . , such bidder shall be liable to the trustee for all damages . . . , including any court costs and reasonable attorneys' fees.

If the last and highest bidder willfully fails to deliver to the trustee the amount of his final bid . . . , such bidder shall be guilty of a misdemeanor . . . .

Civil Code §2932. A power of sale may be conferred by a mortgage . . . .

Civil Code §2934a. The trustee under a trust deed upon real property . . . may be substituted by the recording . . . of a substitution executed and acknowledged by all of the beneficiaries . . . , and such substitution shall be effective notwithstanding any contrary provision in any trust deed . . . .

Code of Civil Procedure §529. On granting an injunction, the court or judge must require . . . a written undertaking on the part of the applicant, with sufficient sureties . . . .

Code of Civil Procedure §1085. [The writ of mandate] may be issued by any court . . . to any inferior tribunal . . . , to compel the performance of an act which the law specially enjoins . . . .

Code of Cvil Procedure §1161a. In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, . . . may be removed therefrom as prescribed in this chapter.

. . . .

3. Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . , and the title under the sale has been duly perfected.

Code of Civil Procedure §1174. (a) If upon the trial, the [findings] be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises . . . .

. . . .

(b) The jury or the court . . . shall also assess the damages occasioned to the plaintiff by any . . . unlawful detainer . . . . If . . . malice is shown, the plaintiff may be awarded . . . punitive damages in an amount which does not exceed three times the amount of damages and rent found due . . . .

. . . .

(d) A plaintiff, having obtained a writ of restitution . . . , shall be entitled to have the premises restored to him by officers charged with the enforcement of such writs. . . . [T]he enforcing officer shall serve an occupant or [post and mail copies of the writ] . . . . If the tenant does not vacate the premises within five days from the date of service, or [of mailing], the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-397

SUSAN GARFINKLE et vir.
Appellants,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY,
(WELLS FARGO BANK, et al., Real Parties in Interest),
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Affirm or Dismiss

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.
INTRODUCTION

The decision of the Supreme Court of the State of California is that power of sale foreclosure on deeds of trust in California does not involve state action within the context of the Fourteenth Amendment.[1]

1. Appellants' Jurisdictional Statement states as fact many matters which are neither true nor relevant. We do not further divert attention from the constitutional issue by discussing them.

The decision is so clearly correct that, without further briefing or argument, it ought to be affirmed, or the appeal should be dismissed for want of a substantial federal question.

Accordingly, we move under Rule 16 of the Rules of this Court to affirm the decision of the Supreme Court of the State of California, or to dismiss the appeal for want of a substantial federal question.

II.
ARGUMENT

A. In California Powers of Sale Derive from Private Contract.[2]

Powers of sale, like other powers coupled with an interest, came into use in California as creations of agreement recognized as valid at common law, long ago, *Koch v. Briggs,* 14 Cal. 256 (1859), Restatement of Agency 2d, Section 138.

That fact is evident from the language of the very legislation with which this appeal is concerned, which commences with the words:

> "Where . . . in any transfer in trust made after July 27, 1917 . . . a power of sale is conferred upon the . . . trustee . . . to be exercised after a breach of the obligation for which such . . . transfer is a security . . . ." California Civil Code Section 2924.

B. The "Pervasive Involvement" of the State of California in Power of Sale Foreclosure is to Codify and Restrict, Rather Than to Authorize or Encourage, Its Use.

California Civil Code, Section 2924, was amended in 1917 to require recordation of Notice of Default and Election to Sell, the lapse of three months during which default could be cured, notice of time and place of sale, and certain sale procedures, all

2. The origins of use of powers of sale in agreements creating security interests in real property in California are reviewed at length in an article by Messrs. Burke and Reber entitled: *State Action, Congressional Power and Creditors' Rights: an Essay on the Fourteenth Amendment,* No. 47, Vol. 2 Southern California L. Rev. 1.

as conditions to the exercise of power of sale given in trust deeds. 1917 Cal.Stats. Ch. 204.

The California Legislature thereby did two things. It codified California common law and it curtailed the rights previously enjoyed by creditors under California common law. For these two propositions for which stands the decision of the California Supreme Court with which this appeal is concerned, the decision of the California Supreme Court is conclusive, since both propositions are pure questions of California law.

C. "Legislative Involvement" by Codification and Curtailment of Common Law Rights Created by Agreement Does Not Cause Those Rights or Their Exercise to Constitute State Action to Which the Fourteenth Amendment Is Applicable.

Apart from California decisions such as in this case, in *Connolly Development, Inc. v. Superior Court,* 17 Cal.3d 803, 553 P.2d 637 (1976) and in *Kruger v. Wells Fargo Bank,* 11 Cal.3d 352, 521 P.2d 441 (1974), there are numerous Federal decisions in support of the proposition that codification and curtailment of common law rights do not remove those rights, nor their exercise from the private sector. *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (May 15, 1978); *Melara v. Kennedy,* 541 F.2d 802, 806 (9th Cir. 1976); *Northrip v. Federal National Mortgage Ass'n,* 527 F.2d 23 (6th Cir. 1975); *Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974); *Bond v. Dentzer,* 494 F.2d 302, 311-312, (2d. Cir. 1974), cert. denied, 95 S.Ct. 65 (1974).

More specifically it has been held repeatedly that codification and curtailment of power of sale rights created by trust deed agreements do not cause such rights or their exercise to constitute State action to which the Fourteenth Amendment is applicable.

ARIZONA: *Kenly v. Miracle Properties,* 412 F.Supp. 1072 (D. Ariz. 1976) (found no state action)

CALIFORNIA:

Lawson v. Smith, 402 F.Supp. 851 (N.D. Cal. 1975) (found no state action)

U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App.3d 68, 116 Cal. Rptr. 44 (1974) (found no state action)

Strutt v. Ontario Savings & Loan Ass'n., 11 Cal.App.3d 547, 90 Cal. Rptr. 69 (1970) (found no state action)

Lancaster Security Inv. Corp. v. Kessler, 159 Cal.App.2d 649, 324 P.2d 634 (1958) (found no state action)

Davidow v. Corporation of America, 16 Cal. App.2d 6, 60 P.2d 132 (1936) (found no state action)

Davidow v. Lachman Bros. Investment Co., 76 F.2d 186 (9th Cir. 1935) (found no state action)

DISTRICT OF COLUMBIA:

Bryant v. Jefferson Federal Savings & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974) (found no state action and waiver)

Young v. Ridley, 309 F.Supp. 1308 (D.D.C. 1970) (found no state action)

GEORGIA:

Coffey Enterprises Realty v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975) (found no state action)

Global Industries v. Harris, 376 F.Supp. 1379 (N.D. Ga. 1974) (found no state action)

National Community Builders, Inc. v. Citizens & Southern National Bank, 232 Ga. 594, 207 S.E.2d 510 (1974) (found no state action)

Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1933) (due process not violated; implied finding of no state action)

Southern Mutual Investment Corp. v. Thornton, 131 Ga. App. 765, 206 S.E.2d 846 (1974) (found no state action)

GUAM:

Y Aleman Corporation v. Chase Manhattan Bank, 414 F.Supp. 93 (D. Guam) (found no state action)

HAWAII:

Maile v. Carter, 17 Hawaii 49 (1905) (no state action or waiver)

IDAHO:

Roos v. Belcher, 79 Idaho 473, 321 P.2d 210 (1958) (found notice sufficient)

MICHIGAN:

Northrip v. Federal National Mortgage Ass'n., 527 F.2d 23 (6th Cir. 1975) (found no state action)

Cramer v. Metropolitan Savings & Loan Ass'n., 401 Mich. 252, 258 N.W.2d 20 (1977) (found no state action)

National Airport Corporation v. Wayne Bank, 73 Mich. App. 572, 252 N.W.2d 519 (1977) (found consent and no state action)

MISSOURI:

Federal National Mortgage Ass'n. v. Scott, 548 S.W.2d 545 (1977) (found no state action)

Federal National Mortgage Ass'n. v. Howlett, 521 S.W.2d 428 (1975), rehearing denied, 423 U.S. 1026 (1975) (found no state action)

MONTANA:

Great Falls Nat'l Bank v. McCormick, 152 Mt. 319, 448 P.2d 991 (1968) (found notice sufficient, state action not discussed)

NEVADA:

Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978) (found no state action)

NORTH CAROLINA:

Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975). Appeal dismissed for lack of substantial constitutional question, 288 N.C. 238, 217 S.E.2d 678 (1975) (found notice sufficient, state action not discussed)

NORTH DAKOTA:

Robinson v. McKinney, 4 Dak. 290, 29 N.W. 658 (1886) (found notice sufficient and waiver, state action discussed)

TEXAS:

Armenta v. Nussbaum, 519 S.W.2d 673 (1975) (found no state action)

Barrera v. Security Bld. & Investment Corp., 519 F.2d 1166 (5th Cir. 1975) (found no state action)

Leisure Estates of America, Inc. v. Carmel Development Co., 371 F.Supp. 556 (S.D. Tex. 1974) (found no state action)

VIRGINIA: *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977) (found no state action)

WASHINGTON: *Kennebec, Inc. v. Bank of the West*, 88 Wash.2d 718, 565 P.2d 812 (1977) (found no state action)

The very question has received the attention of this Court, recently,* twice.

In *Howlett v. Federal National Mortgage Association*, 423 U.S. 909 (1975), rehearing denied 423 U.S. 1026 (1975), appeal from a decision of the Supreme Court of Missouri, which concluded that state action was not present in power of sale foreclosure, codified in statutes not significantly different from those of California, was dismissed by this Court for want of a substantial federal question.

In *Levine v. Stein*, 434 U.S. 1046 (1978) this Court declined to review on Writ of Certiorari the decision of the Fourth Circuit in 560 F.2d 1175 holding that foreclosure by power of sale of trust deeds which were codified by Virginia statute did not involve state action to which the Fourteenth Amendment was applicable.

In footnote 8 on page 22 of Appellants' Jurisdiction Statement are cited several recent cases as holding power of sale foreclosure unconstitutional.

They are not in point, or concern materially different legislation, or have been reversed.

(1) *United States v. White*, 429 F.Supp. 1245 (N.D. Miss. 1977) and *Ricker v. United States*, 417 F.Supp. 133 (N.D.Me. 1976) are cases in which the *Federal Government* itself was the foreclosing party.

*In 1959 this Court dismissed an appeal and denied certiorari in *Lancaster Security Investment Corp. v. Kessler*, 358 U.S. 306, in which the precise question now before the Court was presented.

(2) *Turner v. Blackburn*, 389 F.Supp. 1250 (W.D.N.C. 1975) held North Carolina's power of sale foreclosure statute not constitutional. The California Supreme Court in its opinion, page 15, expressed its agreement with the decision of the District Court in *Lawson v. Smith*, 402 F.Supp. 85 (N.D. Cal. 1975) that under the North Carolina statutory scheme, the Clerk of the Superior Court had duties which were discretionary (they are indeed *judicial*) not merely ministerial, and the statutory scheme was, therefore, significantly unlike the California statutory scheme. It should be observed, moreover, that in *Britt v. Britt*, 26 N.C.App. 132, 215 S.E.2d 172 (1975) the North Carolina Court of Appeals refused to follow *Turner v. Blackburn*, and North Carolina's Supreme Court denied certiorari for want of a substantial constitutional question, at 217 S.E.2d 678.

(3) In *Garner v. Tri-State Development Co.*, 382 F.Supp. 377 (E.D. Mich. 1974) and in *Northrip v. Federal National Mortgage Ass'n.*, 372 F.Supp. 594 (E.D. Mich. 1974), two district judges of the Federal District Court found Michigan so involved in power of sale foreclosures as to cause such foreclosure to constitute state action.

The 6th Circuit reversed *Northrip* (but not on "other grounds" as Appellants state), concluding that state action was absent, at 527 F.2d 23 (1975).

The Michigan courts have followed the 6th Circuit: *Cramer v. Metropolitan Savings & Loan Association*, 401 Mich. 252, 258 N.W.2d 20 (1977); *National Airport Corporation v. Wayne Bank*, 73 Mich. App. 572, 252 N.W.2d 519 (1977).

D. Flagg Brothers, Inc. v. Brooks.

Appellants urge upon this Court, as they did upon the Supreme Court of the State of California,[3] the argument that this Court's

3. Appellants' request that this Court remand this case to the California Supreme Court for reconsideration in light of *Flagg Brothers, Inc. v. Brooks* ignores the fact that the California Supreme Court considered the significance of *Flagg Brothers* when it denied Appellants' Petition for Rehearing.

decision in *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729 (May 15, 1978) supports the conclusion that power of sale foreclosure involves state action.

In *Flagg Brothers,* this Court found no state action in private foreclosure sale of property stored by a warehouseman having a possessory lien.

The holding in *Flagg Brothers* is in emphatic accord with the decision at hand. In *Flagg Brothers* the Court said:

> "Thus the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York." (*Flagg Brothers, supra,* at 1734.)
>
> "This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.
>
> "Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the *settlement of disputes between debtors and creditors is not traditionally an exclusive public function.* Cf. *United States v. Kras,* 409 U.S. 434, 445-446 (1973). Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh.* This is true whether these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another. Compare *Cox Bakeries v. Timm Moving & Storage,* 554 F.2d 356, 358-359 (1977), with *Melara, supra,* at 805-806, and n. 7. Cf. *Bell v. Maryland,* 378 U.S. 226, 334-335 (1964) (Black J., dissenting).

> *"Thus, even if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it.* We conclude that our sovereign function cases do not support a finding of state action here." (Emphasis added; footnotes omitted. *Flagg Brothers, supra,* at 1735-1737)
>
> "This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State." (*Flagg Brothers, supra,* at 1737)

California's Supreme Court might have said these things in deciding this case. It might have further quoted from *Flagg Brothers,* saying of this case:

> "If [California] had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or permit the sort of sale threatened here. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner."
>
> "Not only is this notion completely contrary to that 'essential dichotomy,' . . . between public and private acts, but it has been previously rejected by [the United States Supreme] Court . . . ."
>
> "Here, the State of [California] has not compelled the sale . . ., but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of [Appellants'] complaint is not that the State *has* acted, but that it has *refused to act.*" (*Flagg Brothers, supra,* at 1738.)

Should this court hold not constitutional the legislation in California concerning power of sale foreclosures, the result would deprive debtors of safeguards and rights provided by that legislation, rather than outlaw power of sale foreclosures.

III.

CONCLUSION

Since it is apparent from numerous and recent decisions of this Court, that no state action exists in power of sale foreclosure of trust deeds in California, and that the California legislation limiting use of power of sale foreclosure is not unconstitutional, the decision below should be affirmed, or the Appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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October 5, 1978

CERTIFICATE OF SERVICE

DAVID W. LENNIHAN states that he is a member of the Bar of this Court; that on October 5, 1978, he deposited in the mail at San Francisco, California, five (5) sealed envelopes, with postage fully prepaid thereon, containing three (3) copies of the foregoing Motion to Affirm or Dismiss, addressed as follows:

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-397

SUSAN GARFINKLE, ET VIR.,
Appellants,

VS.

SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, et al., Real Parties in Interest),
Appellees.

On Appeal from the Supreme Court of the State of California

REPLY TO MOTION TO AFFIRM OR DISMISS

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ARGUMENT

The State Actively Participates In the Deprivation.

Appellees completely miss the point of this appeal. We do *not* contest their argument that the mere "codification and curtailment of common law rights" is insufficient "state action," Motion at 2-6. The challenge here is to *an enforcement procedure that includes essential State participation,* without which the contractual power of sale would be useless under modern California property law. Most importantly, summary court process commands homeowners to

surrender possession of their property, and law enforcement officers carry out the physical eviction. At the very outset of the procedure, the county recorder clouds the homeowner's title; and the recorder subsequently perfects the involuntary change in title. Even the trustee, while ostensibly a "private" party, acts under a statutory compulsion to "fulfill the purpose of the trust," Civil Code § 2258. These and several other interrelated actions by the State are presented, with citations, in the Jurisdictional Statement at 12-20.

The opinion below recognizes that California's courts order the surrender of possession and that the recorder participates prior to the vesting of title. Appendix A at 6-8, 15-16. The appeal is required because the California Supreme Court failed to accord these and other factors the significance that is dictated by *Flagg Brothers, Inc. v. Brooks,* 98 S.Ct. 1729, 1734, 1736-1738 and nn. 10-12 (1978), and other authorities cited in the Jurisdictional Statement. Appellees quote from *Flagg Brothers'* discussions of (1) the public function theory and (2) the "mere acquiescence in a private action." Motion at 8-9. *We do not dispute the Court's holding that those two factors are insufficient state involvement* (although we note that Mr. Justices Stevens, White and Marshall dissented from that holding, and Mr. Justice Brennan did not participate). *Flagg Brothers* is pertinent here because of its authoritative explanation of why there was a right to Due Process in *Sniadach, Fuentes* and *North Georgia Finishing. Flagg Brothers* stressed that "state action" was present in those

cases because state officials or state process were involved in the physical deprivations of property, or because the authority of the State had been invoked to coerce the deprivations. The Court also stressed that "no state officials or process were ever involved in enforcing" the warehouseman's possessory lien rights. These critical factors *are* involved in California's nonjudicial foreclosure procedure, to a much greater degree than in *Sniadach* and *North Georgia Finishing,* where the only overt official act was the *ministerial* issuance of a writ by a court clerk. *See* Jurisdictional Statement at 12-16.

The cases cited by appellees for the "codification and curtailment" proposition are not in point.[1] Only a handful indicate that a public official or a court participates in any way. None of them had the benefit of *Flagg Brothers,* which provided the first analysis by this Court of "state action" in the field of creditor remedies. Neither the opinion below nor the overwhelming majority of appellees' cases even mentions the "state action" aspects of *Sniadach, Fuentes* or *North Georgia Finishing.* At a minimum, *Flagg Brothers'* explanation of those decisions raises substantial

[1]Ten of the cases cited for that proposition do not purport to decide the "state action" question: *Lancaster Security Inv. Corp. v. Kessler,* 324 P.2d 634 (Cal.App. 1958); *Young v. Ridley,* 309 F.Supp. 1308 (D.D.C. 1970); *National Community Builders, Inv. v. Citizens & Southern Nat. Bank,* 207 S.E.2d 510 (Ga. 1974); *Ruff v. Lee,* 197 S.E.2d 376 (Ga. 1973); *Southern Mutual Inv. Corp. v. Thornton,* 206 S.E.2d 846 (Ga.App. 1974); *Maile v. Carter,* 17 Hawaii 49 (1905); *Roos v. Belcher,* 321 P.2d 210 (Ida. 1958); *Great Falls Nat'l Bank v. McCormick,* 448 P.2d 991 (Mont. 1968); *Britt v. Britt,* 215 S.E.2d 172 (N.C.App. 1975), *appeal dismissed* 217 S.E.2d 678; *Robinson v. McKinney,* 29 N.W. 658 (N.Dak. 1886).

questions about the correctness of the opinion below. *Flagg Brothers* was decided too late to be considered in that opinion, and the California Supreme Court *summarily* denied our petition for a rehearing to consider this Court's controlling pronouncements.

Appellees also make misleading references to three cases that were summarily disposed of by this Court. They assert that "In 1959 this Court dismissed an appeal and denied certiorari in *Lancaster Security Investment Corp. v. Kessler,* 358 U.S. 306, in which the precise question now before the Court was presented." Motion at 6 n*; *see also id.* at 4, stating that the lower court "found no state action." In fact, there is no mention at all of the "state action" doctrine in the lower court decision, 324 P.2d 634, and only one minor reference in the lengthy arguments presented to this Court. *See* briefs filed in Docket No. 521, October Term, 1958. Secondly, in *Federal National Mortgage Assn. v. Howlett,* appellees' entire argument was that "THE JUDGMENT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS." Docket No. 75-5081, Motion to Dismiss Appeal. And in *Levine v. Stein,* respondents argued that petitioners were barred by their failure to raise the constitutional issue in prior state litigation. Docket No. 77-760, Opposition at 9-12. Moreover, *Levine* involved commercial property, the trustee took possession before the sale, and there was no contention that any public official or court process was involved. *See id.,* Petition for Writ of Certiorari.

CONCLUSION

The California Supreme Court held that there is no right to Due Process even though State officers, courts and records participate in a statutory procedure that is used to deprive people of their homes. The need for Due Process is particularly great here, where appellants have made all payments required by the loan. They are threatened with foreclosure solely because they protested a bank policy, and the threat continues despite the California Supreme Court's ruling that an identical bank policy is illegal. *See* Jurisdictional Statement at 3-7.

The appellees ignore the issues raised by the Jurisdictional Statement and dwell instead upon propositions that are not contested. Their failure to confront our arguments underscores the substantiality of the questions. Those questions require plenary review by this Court or, alternatively, by the California Supreme Court in reconsidering its ruling in light of *Flagg Brothers.*

October 1978.

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